No. _____

In the Supreme Court of the United States

October Term, 2018

ANTONIO AMAR WHITE, *PETITIONER*,

V.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether Petitioner's sentence violated the Sixth Amendment because the district court's factual findings, based on dismissed conduct, provided the legally essential predicate for an otherwise unreasonable sentence?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Antonio Amar White asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on October 1, 2018.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is attached as an appendix to this petition.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Court of Appeals entered judgment in Petitioner's case on October 1, 2018. This petition is filed within 90 days after entry of judgment. *See* SUP. CT. R. 13.1. This Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to … trial, by an impartial jury …."

STATEMENT

As part of an operation called the Safe Streets Task Force, FBI Special Agent James Hicks hired Mark Williams as a confidential informant to identify sellers of crack cocaine. Williams has an extensive history of drug abuse and crime, experience that the FBI wanted to exploit to identify drug dealers.

Williams told agent Hicks that he could buy crack from Petitioner Antonio White at a house on Goodman Street in northeast El Paso. Petitioner did not own the house, nor did he live there. Hicks instructed Williams to buy crack on four separate occasions

in June and July 2016. Each purchase occurred at the Goodman Street house.

Agent Hicks gave Williams money to buy the crack. Williams bought $200 worth the first two times: 2.72 grams on June 8, and 2.98 grams on June 15. On June 21 he paid $500 for 8.3 grams, and on July 7 he paid $1000 for 21.64 grams. Hicks testified that the purpose for increasing the quantity was to determine the level of the drug dealer and the quantity he is capable of selling.

The first three purchases—on June 8, June 15, and June 21—were very similar to each other. At unknown times, Williams called a phone number Petitioner had given to him to arrange for a buy. On the day of each sale, Williams would call Petitioner to tell him that he was on his way to the Goodman Street house. Each time, Williams arrived to the Goodman Street house before Petitioner arrived and would wait with Will Wright, whose father owned the Goodman Street house. Each time, Williams made a hand-to-hand transaction, exchanging money for drugs, sometimes with Wright and sometimes with Petitioner.

Williams then told Petitioner he wanted to buy an ounce, a significantly larger amount that he had purchased before. On July 7, Williams again drove to the Goodman Street house. Unlike the previous meetings, there were many people at the house, including

some who were using crack cocaine. When Williams arrived, Petitioner was sitting on a couch in a room with at least six other people. This time, there was no hand-to-hand exchange. Williams gave his money to Petitioner, who counted it and handed it to someone else. An unidentified person then placed the crack on a table for Williams to take. While Williams could not identify that person, he confirmed it was not Petitioner. At trial, there was no evidence that Petitioner had instructed anyone to give the crack to Williams.

Petitioner was charged in a four-count indictment with distributing a detectable amount of crack cocaine, in violation of 21 U.S.C. § 841(a)(1), on four separate occasions: June 8, 2016 (Count One), June 15, 2016 (Count Two), June 21, 2016 (Count Three), and July 7, 2016 (Count Four).

Petitioner went to trial. The jury found him guilty of Counts One, Two, and Three. The jury could not come to an agreement on Count Four. The district court declared a mistrial on Count Four and dismissed it on the Government's motion.

A probation officer prepared a presentence report. The report held Petitioner responsible for a total of 35.37 grams of crack cocaine. This total included 21.64 grams of crack that Williams purchased on July 7—the subject of dismissed Count Four. The report

also alleged that Petitioner was the source of supply for all four transactions. As a result, Petitioner's base offense level was 24. U.S.S.G. §2D1.1(a)(5) (Nov. 2016). Because there was no evidence about "how much involvement [Petitioner] had with the planning and scope of the drug transactions," he received a two-level minor-role adjustment which reduced his total offense level to 22. U.S.S.G. §3B1.2(b). That combined with Petitioner's placement in Criminal History Category V to produce a Guidelines range of 77 to 96 months. U.S.S.G. Ch.5, Pt.A (Sentencing Table). Had the offense calculation not included the dismissed conduct in the offense calculation, Petitioner's offense level would have been 18, and his resulting Guidelines range would have been 41 to 51 months.

Petitioner objected to the allegation that he was responsible for the 21.6 grams of crack Williams purchased on July 7. The district court responded, "Well, I disagree with you. Your objection is overruled. Relevant conduct will be counted, the count alleged in Count Four." The court adopted the presentence report, and sentenced Petitioner to three concurrent terms of 80 months' imprisonment.

On appeal, Petitioner argued that the district court clearly erred by including that crack alleged in dismissed Count Four in the Guidelines calculation because it was not relevant conduct to

his offenses of conviction. In particular, the trial evidence established that the Goodman Street house, not Petitioner in particular, was the source of the drugs. Petitioner had minor involvement and sold only small amounts of crack to Williams. Once Williams requested a significantly larger amount, a jury could not find that Petitioner was responsible for distributing over 21 grams of crack to Williams. Petitioner also argued that, because his sentence would be substantively unreasonable but for that judicial fact-finding, the sentence violates the Sixth Amendment. The court of appeals affirmed, finding that the dismissed conduct from July 7 was relevant conduct under U.S.S.G. §1B1.3, and the circuit law foreclosed Petitioner's constitutional claim. App.; *see also United States v. Hernandez*, 633 F.3d 370, 374 (5th Cir. 2011).

REASONS FOR GRANTING THE WRIT

The Court Should Grant Review to Decide Whether a Sentence That Is Reasonable Only Because of Judge-Found Facts Violates the Sixth Amendment.

This case presents the important question of whether the Sixth Amendment permits judges, as opposed to juries, to find facts necessary to render a sentence reasonable. This Court has repeatedly "left [that question] for another day." *Jones v. United States*, 135 S. Ct. 8, 8–9 (2014) (Scalia, J., dissenting from the denial of certiorari). The courts of appeals have interpreted the Court's silence as an endorsement of the proposition that an otherwise unreasonable sentence supported by judicial fact-finding is constitutional as long as it is within the statutory sentencing range. This proposition, however, is contrary to other sentencing decisions of the Court.

The practice of allowing judicial fact-finding to increase an otherwise unreasonable sentence "has gone on long enough." *Jones*, 135 S. Ct. at 9 (Scalia, J., dissenting from the denial of certiorari). Petitioner's case underscores why. Petitioner was sentenced to 80 months for drug crimes that do not ordinarily carry that sentence, based on factual findings made by the sentencing judge by a preponderance of the evidence. The Court should finally resolve the long-unsettled question of whether this is an unconstitutional sentencing practice.

A. The Question Presented Is Important, Expressly Reserved by This Court, and Subject To Extensive Debate by Judges In The Lower Courts.

1. In *Rita v. United States*, 551 U.S. 338 (2007), this Court held that applying a presumption of reasonableness to within-Guidelines sentences is constitutional because the Sixth Amendment does not "automatically forbid" a judge from considering factual matters not determined by the jury. *Id.* at 352. Justice Scalia, joined by Justice Thomas, expressed concern that this scheme would lead to "constitutional violations" if a defendant's sentence is "upheld as reasonable only because of the existence of judge-found facts." *Id.* at 374 (opinion concurring in part and concurring in the judgment). In response, the Court stated that this question was "not presented by this case." *Id.* at 353. Justice Stevens, joined by Justice Ginsburg, noted that "[s]uch a hypothetical case should be decided if and when it arises." *Id.* at 366 (concurring opinion).

Justice Scalia again emphasized in *Gall v. United States*, 128 S. Ct. 586 (2007), that "the Court has not foreclosed as-applied constitutional challenges to sentences" and that "the door therefore remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury." *Gall*, 128 S. Ct. at 602–603 (Scalia, J., concurring). This conclusion follows from the Supreme

Court's affirmance on the "substance" of the Sixth Amendment which "guarantee[s] that the jury [will] stand between the individual and the power of the government." *United States v. Booker*, 543 U.S. 220, 237 (2005). That guarantee is threatened when "very serious" enhancements take a sentence beyond the length supported by the jury verdict or guilty plea. *Id.* at 236.

Seven years after *Rita* and *Gall*, Justice Scalia, joined by Justices Thomas and Ginsburg, noted the pressing need for the Court to resolve the question. *See Jones*, 135 S. Ct. at 8–9 (opinion dissenting from the denial of certiorari). Justice Scalia observed that, ever since the question was reserved in *Rita*, the courts of appeals had "uniformly taken our continuing silence" on the question as "suggest[ing] that the Constitution does permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range." *Id.* at 9. Justice Scalia urged the Court to grant certiorari in an appropriate case in order to "put an end to the unbroken string of cases disregarding the Sixth Amendment—or to eliminate the Sixth Amendment difficulty by acknowledging that all sentences below the statutory maximum are substantively reasonable." *Id.*

Shortly after Justice Scalia's opinion in *Jones*, then-Judge Gorsuch similarly observed that "[i]t is far from certain whether

the Constitution allows" a judge to increase a defendant's sentence within the statutorily authorized range "based on facts the judge finds without the aid of a jury or the defendant's consent." *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (citing *Jones*). Four years later, however, the question remains unanswered by the Court.

2. As several members of the Court have now recognized, the lower courts will continue to authorize sentences that would be unreasonable but for judge-found facts until this Court intervenes. In the decision below, the court of appeals rejected petitioner's Sixth Amendment argument as foreclosed by its precedent, despite the Court's indication that there remains an unresolved question. App. (citing *United States v. Hernandez*, 633 F.3d 370, 374 (5th Cir. 2011)). Other courts also have declined to adopt similar arguments absent clearer guidance from this Court, despite admitting that "there is room for debate." *United States v. Briggs*, 820 F.3d 917, 922 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 617 (2017); *United States v. Cassius*, 777 F.3d 1093, 1099 n.4 (10th Cir.) (calling argument about judge-found sentencing facts "precluded by binding precedent" but citing *Jones*), *cert. denied*, 135 S. Ct. 2909 (2015); *see also United States v. Settles*, 530 F.3d 920, 923–24 (D.C. Cir. 2008) (noting that "we understand why defendants find it unfair

for district courts to rely on acquitted conduct when imposing a sentence," but ultimately relying on "binding precedent" to affirm the sentence), *cert. denied*, 555 U.S. 1140 (2009).

Judges in the lower courts have urged a different approach or called on this Court to provide guidance, noting the importance of the question and the uncertainty surrounding sentencing practices while the question remains open. *See*, *e.g.*, *United States v. White*, 551 F.3d 381, 390 (6th Cir. 2008) (en banc) (Merritt, J., dissenting) (taking the position on behalf of six judges that, when judge-found enhancements increase the Guidelines range so that the sentence would be unreasonable absent those facts, "those judge-found facts are necessary for the lawful imposition of the sentence, thus violating the Sixth Amendment right to a jury trial"), *cert. denied*, 556 U.S. 1215 (2009); *United States v. Bell*, 808 F.3d 926, 932 (D.C. Cir. 2015) (per curiam) (Millett, J., concurring in denial of rehearing en banc) (noting that "only the Supreme Court can resolve the contradictions in the current state of the law"), *cert. denied*, 137 S. Ct. 37 (2016); *id.* at 927 (Kavanaugh, J., concurring in denial of rehearing en banc) ("shar[ing] Judge Millett's overarching concern" and observing that a solution "would likely require" intervention by this Court). The Court should finally resolve the question presented.

B. The Decision Below Is Erroneous.

The court of appeals denied Petitioner's Sixth Amendment challenge as foreclosed. App. Its reliance on *Hernandez* ignores the development of this Court's Sixth Amendment jurisprudence and the serious concerns raised by members of this Court.

The Sixth Amendment was intended to preserve the "jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense." *Southern Union Co. v. United States*, 567 U.S. 343, 350 (2012) (citation omitted). The Sixth Amendment's guarantee of a trial by jury is a constitutional protection "of surpassing importance," *Apprendi v. New Jersey*, 530 U.S. 466, 476–77 (2000), and it "has occupied a central position in our system of justice by safeguarding a person accused of a crime against the arbitrary exercise of power by prosecutor or judge," *Batson v. Kentucky*, 476 U.S. 79, 86 (1986).

The jury trial right is a "fundamental reservation" of jury power that ensures that a judge's "authority to sentence derives wholly from the jury's verdict." *Blakely v. Washington*, 542 U.S. 296, 306 (2004) (emphasis added). In *Apprendi*, this Court held that "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" must either be admitted by the defendant or submitted to a jury. 530 U.S. at 490; *see Blakely*, 542 U.S. at 303. The Court reaffirmed that principle in *Alleyne v.*

United States, 133 S. Ct. 2151 (2013), explaining that, "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." *Id.* at 2162. In *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Court declared Florida's capital sentencing scheme unconstitutional under the Sixth Amendment because it permitted a judge, not a jury, to find the aggravating circumstances necessary to support a defendant's sentence. *Id.* at 624.

These principles apply with equal force when, as here, judicial fact-finding significantly alters the Guidelines range and thereby encourages the court to impose a sentence that would otherwise be substantively unreasonable. Although the Sentencing Guidelines are no longer mandatory, they "remain the starting point for every sentencing calculation in the federal system." *Peugh v. United States*, 133 S. Ct. 2072, 2083 (2013). "[I]f the judge uses the sentencing range as the beginning point" for the sentencing decision, "then the Guidelines are in a real sense the basis for the sentence," even if the ultimate sentence deviates from the Guidelines range. *Id.* (citation omitted). A sentencing court is not free to impose a sentence, even if it falls within the statutory range, without considering the Guidelines range and explaining any variance. To do

otherwise constitutes procedural error and results in an unlawful sentence. *See id*.

Without decision by this Court directly addressing the question presented, however, the Sixth Amendment right to trial by jury is being "lost … by erosion." *Apprendi*, 530 U.S. at 483 (citation omitted). The government is often permitted a "second bite at the apple" at sentencing when it presents a judge with conduct for which the defendant was acquitted or not even charged. That strategy of relying on facts the jury either refused or had no opportunity to find "entirely trivializes" the jury's "principal fact-finding function." *United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring).

Even within the statutory range, there are sentences that would be unlawful but for a judge's fact-finding. Under this Court's Sixth Amendment precedents, facts that justify an otherwise unreasonable sentence must be found by a jury or admitted by the defendant before they can be used to increase the defendant's sentence. This Court should grant review and definitively hold that the practice of sustaining an otherwise unreasonable sentence through judicial fact-finding is unconstitutional.

C. The Question Presented Warrants Review In This Case.

This case underscores the harm caused by judicial fact-finding. Petitioner was convicted by the jury of distributing small amounts of crack on three separate occasions. The jury did not find that Petitioner was responsible for distributing crack a fourth time in an amount nearly three times greater than the combined amount of crack for which Petitioner was responsible. Having failed to convince the jury, the government dismissed the count.

At sentencing, however, the district court decided facts that the jury could not—that Petitioner distributed crack a fourth time, in an amount nearly triple the amount found by the jury. That factual finding alone essentially doubled Petitioner's Guidelines range, increasing it from 41 to 51 months to 77 to 96 months. Without that judge-found fact, Petitioner's 80-month sentence would have been substantively unreasonable. The district court identified Petitioner as playing a minor role in three small transactions. There were not aggravating factors that would have warranted an upward departure or variance.

The unconstitutional practice of judicial fact-finding "has gone on long enough." *Jones*, 135 S. Ct. at 9 (Scalia, J., dissenting from the denial of certiorari). The Court should grant certiorari on this question.

CONCLUSION

FOR THESE REASONS, this Court should grant certiorari in this case.

Respectfully submitted.

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DATED: December 20, 2018.